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No. 02-1308

In the Supreme Court of the United States

ERIC KUNG-SHOU HO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner was precluded from raising a procedural challenge to a Clean Air Act regulation by virtue of 42 U.S.C. 7607(b)(2), which prohibits any challenge to such a regulation in a civil or criminal enforcement proceeding, and requires that any such challenge be brought within 60 days after the regulation is promulgated and in the United States Court of Appeals for the District of Columbia Circuit.

2. Whether application of the Clean Air Act's criminal provision to petitioner's asbestos-removal activities was a permissible exercise of Congress's authority under the Commerce Clause.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-44) is reported at 311 F.3d 589.

JURISDICTION

The judgment of the court of appeals was entered on October 31, 2002. A petition for rehearing was denied on December 4, 2002 (Pet. App. 45). The petition for a writ of certiorari was filed on February 28, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial, petitioner was found guilty on one count of failing to give notice of intent to renovate a facility involving the removal of asbestos, in violation of

42 U.S.C. 7413(c)(2)(B), and one count of failing to comply with asbestos work practice standards, in violation of 42 U.S.C. 7413(c)(1). He was sentenced to two months of community confinement, six months of home confinement, and a $20,000 fine. The court of appeals affirmed petitioner's convictions but reversed the sentence imposed by the district court and remanded for resentencing. Pet. App. 1-44.

1. The Clean Air Act, 42 U.S.C. 7401 *et seq.*, establishes criminal penalties for any person who knowingly violates Section 112 of the Act (42 U.S.C. 7412), or any rule promulgated under that Section. 42 U.S.C. 7413(c)(1). The Clean Air Act also establishes criminal penalties for any person who "knowingly * * * fails to notify or report as required under [the Act]." 42 U.S.C. 7413(c)(2)(B). Regulations promulgated under the Act by the Environmental Protection Agency (EPA) are subject to judicial review in the United States Court of Appeals for the District of Columbia Circuit, by way of a petition for review filed within 60 days after promulgation. 42 U.S.C. 7607(b)(1). The Act further provides that "[a]ction of the Administrator with respect to which review could have been obtained under [Section 7607(b)(1)] shall not be subject to judicial review in civil or criminal proceedings for enforcement." 42 U.S.C. 7607(b)(2).

Section 112 of the Act authorizes the EPA to publish a list of air pollutants that are determined to be hazardous, and to promulgate national emission standards for such designated hazardous air pollutants. 42 U.S.C. 7412. EPA may issue the standards in the form of "work practice" standards—as opposed to numerical emission limits—if the agency determines that numerical limits are not feasible for the control of hazardous air pollutants from a particular "source." 42 U.S.C.

7412(h)(1). Once standards are issued for a pollutant source, the standards are binding on any "owner or operator" of the source. See 40 C.F.R. 61.05(b)-(c).

Asbestos is classified as a "hazardous air pollutant" under the Act. 42 U.S.C. 7412(b)(1); 40 C.F.R. 61.01(a). Recognizing that the renovation or demolition of buildings containing asbestos is a major source of airborne asbestos (38 Fed. Reg. 8821 (1973)), EPA has sought to control emissions by promulgating work practice standards that govern demolition or renovation activities at such buildings. See 40 C.F.R. 61.140-61.157 (Subpt. M). The regulations require, *inter alia*, that asbestos-containing materials be wetted during removal; that the removed or stripped asbestos-containing materials be kept adequately wet to prevent the release of fibers; and that the asbestos-containing materials be sealed in leak-tight containers while wet and stored in such containers until collected for proper disposal. 40 C.F.R. 61.145(c). Additionally, asbestos-containing material cannot be removed, disturbed, or otherwise handled unless a foreman or management-level individual who has been trained in complying with the standards is present on-site. 40 C.F.R. 61.145(c)(8). The regulations mandate that all friable asbestos (material containing more than 1% asbestos that, when dry, can be crumbled, pulverized, or reduced to powder by hand pressure, 40 C.F.R. 61.141) be removed from a building before the commencement of any activity that would break up or dislodge the asbestos-containing material. 40 C.F.R. 61.145(c)(1). The federal work practice standards for asbestos apply to facilities that contain at least 160 square feet or 260 linear feet of regulated asbestos-containing material. 40 C.F.R. 61.145(a)(4).

Section 114(a) of the Clean Air Act authorizes EPA to establish reporting requirements applicable to

owners and operators of emission sources that are subject to regulations promulgated under Section 112. 42 U.S.C. 7414(a). EPA's regulations require that, for any demolition or renovation activity subject to the asbestos work practice standards, the owner or operator must provide EPA with timely written notice of its intent to demolish or renovate the facility. See 40 C.F.R. 61.145(b).

2. In October 1997, petitioner purchased the abandoned Alief General Hospital and the Professional Building in Houston, Texas. Pet. App. 2. In the course of negotiations, petitioner was told by the owner's agent that the property contained significant amounts of asbestos, and that its removal could cost as much as $400,000. *Ibid.* When petitioner purchased the buildings for $700,000, he signed a statement acknowledging that he knew that the property contained asbestos. *Ibid.*

Petitioner consulted a licensed asbestos contractor, who offered to remove and dispose of the asbestos for $325,000. Pet. App. 2. Petitioner rejected that bid as too high and instead hired Manuel Escobedo, who had previously worked for him as a handyman, to hire and supervise a group of workers to perform the asbestos removal. *Id.* at 2-3. Those workers were ultimately paid a total of slightly more than $20,000. *Id.* at 28. Petitioner did not give EPA notice that he was conducting asbestos-removal activities, as required by 40 C.F.R. 61.145(b). Pet. App. 2-3. None of the workers was trained in the proper removal of asbestos, and they were neither told that the fireproofing material being removed contained asbestos nor provided with proper safety equipment. *Id.* at 3. The workers did not wet the asbestos to prevent its spread through the air, as required by the Clean Air Act's work practice

standards for asbestos renovation. *Ibid.* No effort was made to seal the hospital to prevent asbestos from being blown outside; several doors and windows remained open for months, and a large hole to the outside was present in the second floor. *Id.* at 3-4.

On February 12, 1998, a City of Houston building inspector discovered petitioner's illegal asbestos-removal operation and issued a stop-work order. Pet. App. 4. Petitioner halted the removal activities for a short period of time and solicited a bid for removal of the remaining asbestos from a licensed contractor. *Ibid.* Petitioner rejected that bid as too high, however, and he renewed the renovation operation with the untrained workers previously hired by Escobedo, who completed the asbestos removal on March 10, 1998. *Id.* at 4-5. In attempting to tap a waterline to clean out the hospital, workers opened a gas line that exploded and created another hole in the second floor of the hospital. *Id.* at 5.

As a result of the explosion, Texas Department of Health inspectors investigated the site, where they found floors and shelves covered by fireproofing dust and the hospital unsealed, with open doors and windows, as well as the hole blown in the hospital by the explosion. Pet. App. 5. The fireproofing dust was later subjected to chemical analysis and found to contain 2%-20% asbestos; any material containing more than 1% asbestos is subject to federal and state regulation. *Ibid.* Months went by before petitioner finally hired a licensed contractor that sealed the hospital and removed the remaining asbestos. *Id.* at 5-6.

3. In October 2000, petitioner and Escobedo were indicted by a federal grand jury for violations of, *inter alia*, the Clean Air Act. Pet. App. 6. The jury ultimately found petitioner guilty on one count of failing to

give EPA notice of the asbestos renovation at a facility, and one count of failing to comply with the asbestos work-practice rules. *Id.* at 7. The district court sentenced petitioner to two months of community confinement, six months of home confinement, and a $20,000 fine. Pet. 6.

4. The court of appeals affirmed petitioner's convictions.[1]

a. The court of appeals held that the application of the Clean Air Act to petitioner's conduct was a valid exercise of congressional authority under the Commerce Clause. Pet. App. 24-30. The court assumed, *arguendo*, that no asbestos had escaped from the hospital to the outside air as a result of petitioner's removal activities. *Id.* at 24. The court recognized, however, that under this Court's decisions, "Congress may regulate wholly intrastate activities that substantially affect interstate commerce." *Ibid.* The court observed that asbestos removal "is very much a commercial activity in today's economy," *id.* at 25, and that "[petitioner's] activities were driven by commercial considerations," *id.* at 26. The court concluded that intrastate asbestos-removal activities are legitimate subjects of federal regulation because Congress could rationally find that there is a national market for

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[1] The United States cross-appealed the district court's denial of a six-level enhancement for repetitive discharge of asbestos into the environment under Sentencing Guidelines § 2Q1.2(b)(1)(A) and a four-level enhancement for petitioner's actions as an organizer or leader of an extensive criminal scheme under Sentencing Guidelines § 3B1.1(a) (the district court allowed a two-level enhancement instead). Pet. App. 7. The court of appeals reversed the district court's rulings on those enhancements and remanded for resentencing. *Id.* at 37-44. Petitioner does not seek this Court's review of any sentencing issue.

asbestos-removal services and that conduct like petitioner's—which circumvents licensed removal companies that bear the expenses of safe removal—undermines that market and thereby threatens to drive up the costs of proper asbestos removal. *Id.* at 28. The court also observed that activities such as petitioner's could undermine the interstate commercial real estate market by giving unscrupulous property owners a competitive advantage over conscientious owners who accept the added expense of safe asbestos removal. *Id.* at 28-29.

b. The asbestos work practice standards that petitioner was convicted of violating apply only to a "facility" as that term is defined in 40 C.F.R. 61.141. The regulatory definition encompasses "any institutional, commercial, public, industrial, or residential structure, installation, or building." *Ibid.* As amended in 1990, the definition further provides that "*[a]ny structure, installation or building that was previously subject to this subpart is not excluded, regardless of its current use or function.*" *Ibid.* (emphasis added). Petitioner contended in the court of appeals that the regulatory provision had been amended through procedurally invalid means because the italicized language had not been included in the proposed rule submitted for public comment. See Pet. App. 35-36.

The court of appeals rejected that contention. Pet. App. 35-37. The court explained that under the Clean Air Act, the 1990 amendment could have been challenged immediately in the District of Columbia Circuit, but "the amended definition is 'not subject to judicial review in civil or criminal proceedings.'" *Id.* at 36 (quoting 42 U.S.C. 7607(b)(2)). The court also noted that in *Adamo Wrecking Co.* v. *United States*, 434 U.S. 275 (1978), this Court had barred consideration of a

comparable procedural challenge in the course of a criminal prosecution. Pet. App. 37. The court observed as well that, in any event, "the hospital satisfies the pre-1990 definition of 'facility' because [petitioner] purchased it and removed the asbestos for commercial purposes, and the definition did not exclude previously abandoned buildings." *Id.* at 37 n.22.

ARGUMENT

1. Petitioner contends (Pet. 8-12) that the 1990 amendment to the regulatory definition of the term "facility" was adopted in violation of applicable notice-and-comment requirements, and that the alleged procedural error requires reversal of his convictions. That argument lacks merit.

Under 42 U.S.C. 7607(b)(1), direct judicial review of the 1990 regulatory amendment was available if petitioner had filed a petition for review in the District of Columbia Circuit within 60 days after the rule was promulgated. Section 7607(b)(2) provides that "[a]ction of the Administrator with respect to which review could have been obtained under [Section 7607(b)(1)] shall not be subject to judicial review in civil or criminal proceedings for enforcement." 42 U.S.C. 7607(b)(2). In *Adamo Wrecking*, this Court held that, while a criminal defendant could contend that a particular regulation was not an "emission standard" subject to the preclusion provision, the statutory predecessor to Section 7607(b)(2) foreclosed judicial inquiry in a criminal prosecution into "whether the Administrator has complied with appropriate procedures in promulgating the regulation in question." 434 U.S. at 285. That holding controls this case.

Petitioner argues (Pet. 9) that a different preclusion rule should govern in this case because he has raised an

as-applied Commerce Clause challenge to the regulatory definition of the term "facility." Petitioner contends (*ibid.*) that "[f]undamental principles of fair play and due process are offended when a defendant is held not to have a right to challenge an invalid law that is being used to criminally punish him or her." This Court has held, however, that Congress may require challenges to particular agency regulations to be brought in a specified court within 60 days after promulgation, and may preclude collateral challenges to the regulations in any subsequent criminal prosecution, without denying the defendant due process of law. See *Yakus* v. *United States*, 321 U.S. 414, 433-434 (1944).[2]

In any event, the court of appeals did *not* hold that Section 7607(b)(2) barred petitioner from arguing that application of the Clean Air Act to his own intrastate conduct exceeded Congress's powers under the Commerce Clause. Rather, the court held only that Section 7607(b)(2) precluded consideration of petitioner's claim that the 1990 regulatory amendment was adopted in a procedurally defective manner. That holding is clearly correct under *Adamo Wrecking*. The fact that petitioner has asserted a separate constitutional challenge

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[2] In light of Section 7607(b)(2)'s unambiguous preclusion of petitioner's current procedural challenge to the regulatory definition of "facility," petitioner's reliance (Pet. 10) on *United States* v. *Alexander*, 938 F.2d 942 (9th Cir. 1991), is misplaced. In holding that criminal defendants could contest the validity of the state regulations under which they were prosecuted in that case, notwithstanding their failure to challenge the regulations at the time of promulgation, the court in *Alexander* relied on the absence of any express statutory bar to consideration of the issue within the context of a criminal prosecution. See *id.* at 947-948. The court distinguished *Adamo Wrecking* and *Yakus* on that basis. See *id.* at 947 n.9.

does not entitle him to raise his procedural claim in an untimely fashion, and in a court other than the District of Columbia Circuit.

In addition, petitioner does not contest the court of appeals' determination that "the hospital satisfies the pre-1990 definition of 'facility' because [petitioner] purchased it and removed the asbestos for commercial purposes, and the definition did not exclude previously abandoned buildings." Pet. App. 37 n.22. Petitioner therefore would not be entitled to reversal of his criminal convictions even if his procedural challenge to the 1990 regulatory amendment could properly be raised within this prosecution, and even if that challenge were ultimately found to have merit. For that reason as well, the court of appeals' application of Section 7607(b)(2) to the facts of this case does not warrant this Court's review.

2. Petitioner contends (Pet. 12-15) that application of the Clean Air Act and implementing regulations to his own conduct exceeds Congress's authority under the Commerce Clause. That claim lacks merit. Since *Wickard* v. *Filburn*, 317 U.S. 111 (1942), this Court has recognized that purely intrastate *commercial* activity can be regulated under the Commerce Clause if, when aggregated with similar activity by others, the intrastate conduct has a substantial effect on interstate commerce. *Wickard*'s holding was reaffirmed in *United States* v. *Lopez*, 514 U.S. 549, 560-561 (1995), and in *United States* v. *Morrison*, 529 U.S. 598, 610-613 (2000).[3]

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[3] Petitioner's reliance (Pet. 12-13) on *Jones* v. *United States*, 529 U.S. 848 (2000), is misplaced. That case considered the reach of the federal arson statute, 18 U.S.C. 844(i), not of the Commerce Clause. Nor is petitioner assisted (see Pet. 14-15) by *Solid Waste*

Petitioner's activities here were clearly commercial. Petitioner paid untrained workers approximately $20,000 to remove the asbestos from the hospital after rejecting bids from licensed contractors of $325,000 and $159,876. See Pet. App. 2-4, 28. Asbestos removal is a legitimate business. It is unlike the criminal, non-economic activities at issue in *Lopez* (gun possession in or near a school) and *Morrison* (violence against women). As the size of the bids received and rejected by petitioner demonstrates, asbestos-removal activities can be expected to have a significant aggregate impact on interstate commerce. In addition, petitioner's asbestos-removal efforts were prompted by his desire to use the recently acquired property for commercial purposes. *Id.* at 26.

As the court of appeals recognized (Pet. App. 28-29), conduct of the sort in which petitioner engaged can be expected to have a significant aggregate impact on interstate commerce. Widespread violations of the asbestos work practice regulations could drive reputable asbestos-removal contractors out of business because they could not compete with the prices charged by untrained workers. That, in turn, would reduce the availability of contractors who are trained to remove asbestos safely. See *id.* at 28. In addition, activities of the sort at issue here "pose[] a threat to the interstate commercial real estate market" (*ibid.*) because petitioner and others who violate the asbestos work

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Agency of Northern Cook County v. *United States Army Corps of Engineers*, 531 U.S. 159 (2001). There is no question that the regulations at issue here are well within congressional authority to regulate and protect interstate commercial activity. Cf. *id.* at 172-174 (finding that isolated wetlands regulation "invoke[d] the outer limits of Congress' power," thus requiring a clear statement of congressional intent).

practice regulations gain a commercial advantage over competitors who hire licensed contractors at a higher cost than is charged by itinerant workers. See *id.* at 28-29. The likely harms to both the asbestos-removal industry and the commercial real estate market amply support the court of appeals' holding that petitioner's conduct is within the scope of federal regulatory authority under the Commerce Clause.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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